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FILED
NOV 27 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-241

In the Supreme Court of the United States

ROYA RAHMANI, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

Congress has prohibited the provision of material support to entities designated by the Secretary of State as Foreign Terrorist Organizations (FTOs). Petitioners were indicted for providing money to a foreign entity that had been so designated by the Secretary. That designation was in effect at all relevant times, and its validity has been upheld by the District of Columbia Circuit in challenges brought by the organization. The questions presented are as follows:

1. Whether petitioners are entitled under the First Amendment to challenge in their own criminal proceedings the validity of the Secretary's designation of an FTO.

2. Whether petitioners may constitutionally be prosecuted for providing money to a group whose designation as an FTO was effective when petitioners provided the money and was ultimately upheld by the District of Columbia Circuit.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 15a-35a) is reported at 426 F.3d 1150. The opinion of the district court (Pet. App. 36a-59a) is reported at 209 F. Supp. 2d 1045.

JURISDICTION

The court of appeals entered its judgment on October 20, 2005. A petition for rehearing was denied on April 17, 2006 (Pet. App. 1a-14a). On June 14, 2006, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including August 15, 2006, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Congress found that "foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct." Pub. L. No. 104-132, § 301(a)(7), 110 Stat. 1247. Congress viewed a prohibition on material support for terrorist organizations as "absolutely necessary to achieve the government's compelling interest in protecting the nation's safety from the very real and growing terrorist threat." H.R. Rep. No. 383, 104th Cong., 1st Sess. 45 (1995); see AEDPA § 301(a)(1), 110 Stat. 1247. Accordingly, Section 302 of AEDPA authorized the Secretary of State to designate an entity as a "foreign terrorist organization" (FTO) if she found that: "(A) the organization is a foreign organization; (B) the organization engages in terrorist activity (as defined in section 1182(a)(3)(B) of this title); and (C) the terrorist activity of the organization threatens the security of United States nationals or the national security of the United States." 8 U.S.C. 1189(a)(1). Designations under AEDPA lasted for two years and could then be renewed by the Secretary. 8 U.S.C. 1189(a)(4).[1]

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[1] The criteria for FTO designation were amended by the USA PATRIOT Act of 2001. See Pub. L. No. 107-56, § 411(c), 115 Stat. 349. The provisions governing the length of time for which the Secretary's designations remain in effect, as well as how they can be challenged, were amended in 2004. See 9/11 Commission Implementation Act of 2004, Pub. L. No. 108-458, § 7119(a), 118 Stat. 3801 (8 U.S.C. 1189(a)(4) (Supp. IV 2004)). The changes to the statutory scheme effected by those amendments do not affect this case. Because the designations relevant to petitioners' indictment were made under AEDPA in its original form, this brief describes the statutory scheme as it then existed.

Designation of a group as an FTO brings three legal consequences. First, United States financial institutions possessing or controlling any funds in which the FTO or its agent has an interest are required to block all financial transactions involving those funds. 18 U.S.C. 2339B(a)(2). Second, representatives and members of designated organizations are inadmissible to this country and are ineligible for visas. 8 U.S.C. 1182(a)(3)(B)(i)(IV) and (V). Third, and of particular relevance here, it is a felony for any person within the United States or subject to its jurisdiction to "knowingly" provide "material support or resources" to any designated FTO. 18 U.S.C. 2339B(a)(1).

AEDPA established a specific mechanism for judicial review of the Secretary's designations. "Not later than 30 days after publication of the designation in the Federal Register, an organization designated as a foreign terrorist organization may seek judicial review of the designation in the United States Court of Appeals for the District of Columbia Circuit." 8 U.S.C. 1189(b)(1). If a designation or redesignation by the Secretary has become effective, however, a defendant in a criminal case who is charged with providing material support to an FTO "shall not be permitted to raise any question concerning the validity of the issuance of such designation or redesignation as a defense or an objection at any trial or hearing." 8 U.S.C. 1189(a)(8). AEDPA thus authorized judicial review of the Secretary's designations only at the behest of the designated organization and only in the District of Columbia Circuit.

2. In both 1997 and 1999, the Secretary designated the Mujahedin-e Khalq (MEK) as an FTO. Pet. App. 16a-17a. Although the MEK challenged each designation in the District of Columbia Circuit, see *id.* at 17a, it

did not contest the Secretary's determination that it had carried out many of the attacks found by the Secretary to constitute "terrorist activity" within the meaning of 8 U.S.C. 1182(a)(3)(B). To the contrary, "the MEK submitted evidence showing that it was responsible for numerous assassinations of Iranian officials and mortar attacks on Iranian government installations." Pet. App. 18a; see *id.* at 24a (noting that the MEK has "proudly proclaimed its own terrorist activities"); *People's Mojahedin Org. of Iran* v. *Department of State*, 327 F.3d 1238, 1243 (D.C. Cir. 2003) (*People's Mojahedin II*).

a. The MEK sought judicial review of its 1997 designation by the Secretary as an FTO, and the District of Columbia Circuit upheld the designation. See *People's Mojahedin Org. of Iran* v. *Department of State*, 182 F.3d 17 (1999), cert. denied, 529 U.S. 1104 (2000) (*People's Mojahedin I*). The court held that, as a foreign organization without a presence in the United States, the MEK could not claim rights under the United States Constitution. *Id.* at 22. With respect to the statutory criteria for designation as an FTO, the court noted that the MEK had not disputed its status as a foreign organization. *Id.* at 24. The court concluded that any one of the numerous bombings and killings set forth in the administrative record was sufficient to establish the reasonableness of the Secretary's determination that the MEK had engaged in terrorist activity. *Id.* at 20, 24-25. The court further held that the determination whether the MEK's terrorist activity posed a threat to national security or the security of U.S. nationals was committed to the Secretary of State and was not subject to judicial review. *Id.* at 23.

b. In 1999, the Secretary redesignated the MEK as an FTO. At that time, the Secretary added a new alias

designation for the MEK, finding that the National Council of Resistance of Iran (NCRI) had been acting as the MEK's alter ego. The MEK and the NCRI challenged their 1999 designations. See *National Council of Resistance of Iran* v. *Department of State*, 251 F.3d 192 (D.C. Cir. 2001) (*NCRI I*). The District of Columbia Circuit rejected the MEK's statutory challenges to the Secretary's action. *Id.* at 199-200. The court held, however, that the NCRI had a sufficient presence in the United States to trigger the protections of the United States Constitution, *id.* at 201-203, and that the organization had not been provided with adequate procedural safeguards in connection with the 1999 designation, *id.* at 208-209.

c. The District of Columbia Circuit remanded the matter to the Secretary of State to provide appropriate process to the MEK and the NCRI. 251 F.3d at 209. In light of the foreign policy and national security concerns at stake, and the fact that the 1999 designation would shortly expire in any event, the court expressly declined to "order the vacation of the existing designations." *Ibid.* Shortly thereafter, the 1999 MEK/NCRI designation was replaced by a new FTO designation premised on a new administrative record. See 66 Fed. Reg. 51,088-51,089 (2001).

On remand, the Department of State reviewed the 1999 designation and afforded the MEK the process required by the District of Columbia Circuit's prior opinion. Again, the MEK did not dispute its foreign status, nor did it deny that it had carried out violent and deadly attacks within Iran. The Secretary accordingly declined to vacate the 1999 designation of the MEK as an FTO. The MEK and NCRI then sought judicial review both of that determination and of the new 2001 designation, and

the District of Columbia Circuit upheld the government's actions. See *People's Mojahedin II*, 327 F.3d at 1241-1245; *National Council of Resistance of Iran* v. *Department of State*, 373 F.3d 152, 156-160 (D.C. Cir. 2004) (Roberts, J.) (*NCRI II*).

The designation of the MEK has thus remained in effect, notwithstanding the MEK's repeated invocation of AEDPA's judicial-review provision, throughout the period relevant to this case. The Secretary designated the MEK as an FTO in 1997 and 1999; the MEK challenged both designations; the District of Columbia Circuit affirmed the 1997 designation; the court found that the process used for the 1999 designation was flawed, and it remanded the matter to the Secretary, but the court did not vacate the designation; the Secretary reaffirmed the 1999 MEK designation on remand; and the court rejected the MEK's renewed post-remand challenge to that 1999 designation.

3. On March 13, 2001, petitioners were charged in a 59-count indictment with knowingly providing material support or resources to the MEK, in violation of 18 U.S.C. 2339B(a)(1). Pet. App. 16a, 37a. Some of the charges in the indictment were predicated upon the 1997 designation of the MEK by the Secretary, others were based on the 1999 designation, and a conspiracy count depended on both. C.A. E.R. 2-16. The indictment alleged that, between October 1997 and February 2001, petitioners had undertaken a variety of measures to provide financial support to the MEK. Pet. App. 16a, 37a. The indictment further alleged that petitioners had engaged in those activities despite their awareness that the MEK had been designated as an FTO. *Id.* at 16a. For example, the indictment alleged that petitioners "were told during a telephone conference call with an

MEK leader in October 1997 that the MEK had been designated [as an FTO] by the State Department." *Id.* at 26a-27a.

4. On June 21, 2002, the district court granted petitioners' motion to dismiss the indictment, finding the relevant AEDPA provisions unconstitutional. Pet. App. 36a-59a. The court appeared to recognize that the question whether the MEK possessed the substantive characteristics of an FTO was not before it in this case. See *id.* at 45a-46a. The court held, however, that petitioners could raise the asserted unconstitutionality of 8 U.S.C. 1189's designation procedures as a defense to the criminal charges. Pet. App. 48a-51a.

The government argued that review of the underlying designations was barred by 8 U.S.C. 1189(a)(8), which states that "[i]f a designation under this subsection has become effective * * *, a defendant in a criminal action shall not be permitted to raise any question concerning the validity of the issuance of such designation as a defense or an objection at any trial or hearing." See Pet. App. 50a & n.11. The district court rejected that contention, stating that "Section 1189(a)(8) is an impermissible limitation on the federal courts' jurisdiction to hear constitutional challenges to the sufficiency of an indictment." *Id.* at 51a. The court found that "Section 1189 violates the [petitioners'] due process rights because [petitioners], upon a successful Section [2339B] prosecution, are deprived of their liberty based on an unconstitutional designation they could never challenge." *Ibid.*

The district court concluded that Section 1189 is unconstitutional on its face because "the express language of Section 1189 denies a designated organization the opportunity to be heard in a meaningful manner." Pet.

App. 52a. The court stated that "Section 1189, by its express terms, provides the designated organization with no notice and no opportunity to object to the administrative record or supplement it with information to contradict the designation." *Id.* at 53a. The court held on that basis that "a designation pursuant to Section 1189 is a nullity since it is the product of an unconstitutional statute. When a statute is found to be violative of the Constitution, any action taken thereunder, i.e., a designation of a status authorized by such statute, must likewise fail." *Id.* at 58a. The district court concluded that "the MEK's designation, having been obtained in violation of the Constitution, is a nullity and cannot serve as a predicate in a prosecution for violation of [18 U.S.C.] 2339B." *Id.* at 59a. The court dismissed the indictment in its entirety, including those counts that were predicated solely on the 1997 MEK designation, which had been upheld by the District of Columbia Circuit. *Id.* at 59a & n.17.

5. The court of appeals reversed. Pet. App. 15a-35a.

a. The court of appeals held that Congress had acted constitutionally in vesting judicial review of the Secretary of State's FTO designations exclusively in the District of Columbia Circuit. Pet. App. 20a-21a. The court observed that "[m]any administrative determinations are reviewable only by petition to the correct circuit court, bypassing the district court, and that procedure has generally been accepted." *Id.* at 20a. The court also held that 8 U.S.C. 1189(a)(8), which precludes the defendant in a prosecution under 18 U.S.C. 2339B from collaterally attacking the FTO designation on which the prosecution is based, is consistent with the Due Process Clause. See Pet. App. 21a-22a. The court explained:

> Congress clearly chose to delegate policymaking authority to the President and Department of State with respect to designation of terrorist organizations, and to keep such policymaking authority out of the hands of United States Attorneys and juries. Under § 2339B, if defendants provide material support for an organization that has been designated a terrorist organization under § 1189, they commit the crime, and it does not matter whether the designation is correct or not.

Id. at 22a.

The court of appeals also rejected petitioners' contention that their due process rights had been violated when the District of Columbia Circuit declined to set aside the 1999 designation of the MEK even after finding that the procedures used in connection with that designation were constitutionally infirm. Pet. App. 22a-30a. The court observed that "the designation would have been unobjectionable if, as it initially appeared, the MEK was located entirely abroad and had no American location, and [the designation] was, in any event, harmless because the MEK proudly proclaimed its own terrorist activities." *Id.* at 24a. The court further explained that the MEK itself was entitled to challenge the Secretary's designations in the District of Columbia Circuit and had obtained judicial review of both the 1997 and 1999 designations. *Id.* at 25a. The court of appeals concluded that petitioners could not establish a deprivation of their rights under the Due Process Clause by attacking "a designation that withstood judicial review, that we have no authority to review, that [petitioners] knew was in place throughout the period of the indict-

ment, and that is supported by the MEK's own submission." *Id.* at 27a.

The court of appeals further held that, because the MEK had the opportunity to challenge the FTO designations on which the instant prosecution was premised, the Due Process Clause did "not require another review of the predicate by the court adjudicating the instant § 2339B criminal proceeding." Pet App. 28a. The court noted that its holding was consistent with *United States* v. *Hammoud*, 381 F.3d 316, 331 (4th Cir. 2004) (en banc), vacated and remanded on other grounds, 543 U.S. 1097 (2005), the only other court of appeals decision that had addressed the issue. Pet. App. 29a & n. 51. The court explained that the Fourth Circuit in *Hammoud* had "held that a defendant's inability to challenge the designation was not a violation of his constitutional rights, since the *validity* of the designation is not an element of the crime. Rather, the element is the *fact* of an organization's designation as a 'foreign terrorist organization.'" *Id.* at 29a-30a (footnote omitted).

b. Relying on *McKinney* v. *Alabama*, 424 U.S. 669 (1976), petitioners argued that the defendant in a Section 2339B prosecution has a First Amendment right to attack the validity of the predicate FTO designation. See Pet. App. 30a. The defendant in *McKinney* was a newsstand proprietor who was convicted for selling a magazine that had been found to be obscene in a prior in rem proceeding to which the defendant was not a party. *Id.* at 31a. This Court "held that a decision in another proceeding could not conclusively determine First Amendment rights to sell a magazine of persons who had no notice and opportunity to be heard in that proceeding." *Ibid* In this case, petitioners contended that

they were similarly "entitled to litigate the terrorism designation of the MEK in their criminal case." *Ibid.*

The court of appeals rejected petitioners' First Amendment claim. Pet. App. 30a-35a. The court explained that "[t]he magazine in *McKinney* was speech, the money sent to the MEK is not. Though contributions of money given to fund speech receive some First Amendment protection, it does not follow that all contributions of money are entitled to protection as though they were speech." *Id.* at 31a (footnote omitted). Relying in part on *Regan* v. *Wald*, 468 U.S. 222, 242 (1984), the court found that "[t]he deference due the Executive Branch in the area of national security reinforces our conclusion that furnishing material assistance to foreign terrorist organizations must be distinguished from the *McKinney* issue, furnishing obscene magazines." Pet. App. 33a. The court concluded that "[t]he federal government clearly has the power to enact laws restricting the dealings of United States citizens with foreign entities. We must allow the political branches wide latitude in selecting the means to bring about the desired goal of preventing the United States from being used as a base for terrorist fundraising." *Id.* at 34a (citations, brackets, internal quotation marks, and footnote omitted).

c. The court of appeals denied rehearing en banc, with five judges dissenting. Pet. App. 1a-14a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. In addition, the case is in an interlocutory posture, such that further proceedings on remand may moot the constitutional claims presented here. Further review is not warranted.

1. Petitioners have not been tried for the offenses alleged in the indictment, and the court of appeals' decision does not resolve the merits of the criminal charges. Rather, the court of appeals simply reversed the dismissal of petitioners' indictment, thereby allowing the prosecution to go forward. The interlocutory posture of the case "alone furnishe[s] sufficient ground for the denial" of the petition. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); accord *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam); *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., respecting the denial of the petition for writ of certiorari). If petitioners are acquitted following a trial on the merits, their constitutional claims will become moot. If petitioners are convicted, they will be entitled to reassert their current challenges to the AEDPA provisions on which the prosecution is based, in addition to any other claims they may have at that time.

2. Relying primarily on *McKinney* v. *Alabama*, 424 U.S. 669 (1976), petitioners contend (Pet. 13-21) that they are entitled under the First Amendment to have the judge or jury determine in their own criminal case whether the MEK is indeed a terrorist organization. As noted above, this Court held in *McKinney* that a newsstand proprietor charged with distributing obscene materials was entitled to litigate the question whether the relevant magazine was in fact obscene, and that the defendant could not be bound by a determination made in a prior proceeding in which he had no opportunity to participate. See 424 U.S. at 670-677. As the court of appeals correctly held (Pet. App. 30a-35a), petitioners' reliance on *McKinney* is misplaced because the transfer

of funds to a foreign organization is not comparable for First Amendment purposes to the dissemination of magazines within this country.

a. This Court has recognized that Congress and the Executive have broad authority to regulate financial interactions between United States nationals and foreign entities. In *Regan* v. *Wald*, 468 U.S. 222 (1984), for example, this Court sustained a broad Executive Branch embargo on dealings with Cuba, including travel and financial transactions with Cuban nationals. The Court rejected the plaintiffs' Due Process Clause challenge to the embargo, deferring to the Executive Branch's determination that Cuba should be denied hard currency, in part because of that nation's prior support for violence and terrorism. See *id.* at 240-243. The Court explained that the conduct of foreign relations is "so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." *Id.* at 242 (quoting *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 589 (1952)).

Petitioners contend that *Wald* is inapposite because the Court in that case "not[ed] that no First Amendment rights were at issue." Pet. 19 n.11 (citing *Wald*, 468 U.S. at 241-242). That effort to distinguish *Wald* is unavailing. The Court in *Wald* distinguished the nearly categorical travel ban that was at issue in that case from prior travel restrictions based on political affiliation, which the Court had struck down in *Kent* v. *Dulles*, 357 U.S. 116 (1958), and *Aptheker* v. *Secretary of State*, 378 U.S. 500 (1964). See *Wald*, 468 U.S. at 240-242. The Court found that broadly applicable travel bans like that involved in *Wald* did not implicate "First Amendment rights of the sort that controlled in *Kent* and *Aptheker*." *Id.* at 241; see *id.* at 241-242. AEDPA's ban on financial

transactions with designated FTOs does not turn on the political affiliation or political motivation of the would-be donor but applies across the board. For First Amendment purposes, it is therefore far more analogous to the travel ban that was sustained in *Wald* than to the selective restrictions that were struck down in *Kent* and *Aptheker*.

b. Pertinent lower court decisions have similarly recognized the broad authority of the political Branches to regulate financial transactions between United States nationals and foreign entities. In *Freedom to Travel Campaign* v. *Newcomb*, 82 F.3d 1431 (9th Cir. 1996), the court of appeals rejected the plaintiff's substantive due process challenge to restrictions on travel to Cuba. *Id.* at 1438-1439. The court explained that the travel ban serves "to restrict the flow of hard currency into Cuba," and it noted the "history of judicial deference" to the decisions of the political Branches in the realm of foreign affairs. *Id.* at 1439 (citing, inter alia, *Wald*). Similarly, in *Farrakhan* v. *Reagan*, 669 F. Supp. 506 (D.D.C. 1987), aff'd, 851 F.2d 1500 (D.C. Cir. 1988) (Table), the district court rejected a Free Exercise Clause challenge to the President's economic sanctions program against Libya. *Id.* at 512. The court explained that it had "little choice but to defer to the judgment of the President that all economic intercourse with Libya should cease." *Ibid.*

Petitioners cite no decision in which any court has sustained a First Amendment challenge to federal restrictions on transfers of money to foreign entities. Only one other court of appeals has addressed a constitutional challenge to 8 U.S.C. 1189(a)(8), which bars the defendant in a criminal prosecution from collaterally attacking an FTO designation. See *United States* v. *Hammoud*, 381 F.3d 316, 331 (4th Cir. 2004) (en banc), va-

cated and remanded on other grounds, 543 U.S. 1097 (2005). The court in *Hammoud*, noting that "an FTO designation is subject to judicial review" at the behest of the organization itself, rejected the defendant's constitutional claim. *Ibid.*[2] Because petitioners' First Amendment claim is unsupported by precedent and is inconsistent with established principles of judicial restraint in the field of foreign relations, further review is not warranted.

c. Petitioners' reliance on *McKinney* is therefore unavailing. The ruling in *McKinney* created no risk of interference with the judgments of the political Branches in the realm of foreign affairs. *McKinney*, moreover, involved restrictions on the dissemination of magazines within this country, a form of regulation that implicates the First Amendment far more directly than does a prohibition on financial dealings with discrete foreign entities.[3] As the court of appeals explained,

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[2] The defendant in *Hammoud* did not raise a First Amendment claim but instead argued that Section 1189(a)(8) violated his right to jury trial and was inconsistent with nondelegation principles. See 381 F.3d at 331. This Court vacated the Fourth Circuit's judgment in *Hammoud* and remanded the case for further consideration in light of *United States* v. *Booker*, 543 U.S. 220 (2005). See *Hammoud* v. *United States*, 543 U.S. 1097 (2005). The full Fourth Circuit subsequently reinstated those aspects of its earlier decision that involved matters other than sentencing. See *United States* v. *Hammoud*, 405 F.3d 1034 (2005).

[3] Petitioners' reliance (Pet. 18) on *Heffron* v. *International Society for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981), and *International Society for Krishna Consciousness, Inc.* v. *Lee*, 505 U.S. 672 (1992), is similarly misplaced. Those decisions simply recognized that the oral or written solicitation of otherwise lawful contributions "is a form of speech protected under the First Amendment." *Id.* at 677; see *Heffron*, 452 U.S. at 647. The Court had no occasion to consider the constitutionality of any restriction on the transfer of funds, and the cases did not implicate the authority of federal officials to conduct this

"[t]hough contributions of money given to fund speech receive some first Amendment protection, it does not follow that all contributions of money are entitled to protection as though they were speech." Pet. App. 31a (footnote omitted). And because determinations of obscenity are based on the standards of the local community, see *Miller* v. *California*, 413 U.S. 15, 24 (1973); *McKinney*, 424 U.S. at 673, relitigation of the obscenity question in individual criminal prosecutions did not threaten any interest in nationwide uniformity of the sort implicated by this case.[4]

Furthermore, whereas the offense at issue in *McKinney* turned on whether the defendant had sold a magazine that was in fact obscene, the offense in this case turns on whether the defendant knowingly gave money to an entity that was *designated* as an FTO. A defendant in a Section 2339B prosecution is free to challenge the fact of the designation—which is the pertinent

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Nation's foreign affairs. In both of those cases, moreover, the challenged solicitation restrictions were upheld against First Amendment attack. See *Heffron*, 452 U.S. at 654-655; *Lee*, 505 U.S. at 679-685.

[4] As the Fourth Circuit noted in *Hammoud*, the Secretary of State's designation of a group as an FTO is subject to judicial review at the behest of the organization itself. See 381 F.3d at 331. Congress's decision to centralize such review in the District of Columbia Circuit, and to restrict the timing and scope of that review, furthers compelling purposes. Those purposes would be substantially disserved if judges or juries in individual criminal prosecutions could reach potentially conflicting judgments regarding the validity of a particular FTO designation, especially if that decision had already been reviewed and upheld by the District of Columbia Circuit. Cf. *United States* v. *Bozarov*, 974 F.2d 1037, 1044 (9th Cir. 1992) ("[T]he need for uniformity in the realm of foreign policy is particularly acute; it would be politically disastrous if the Second Circuit permitted the export of computer equipment and the Ninth Circuit concluded that such exports were not authorized by the [statute]."), cert. denied, 507 U.S. 917 (1993).

element of the offense. See Pet. App. 26a ("[T]he *fact* of an organization's designation as [a terrorist organization] is an element of § 2339B, but the *validity* of the designation is not.") (quoting *Hammoud*, 381 F.3d at 331). In addition, a defendant may contend that he did not act "knowingly" within the meaning of the statute. See 18 U.S.C. 2339B(a)(1) (Supp. IV 2004) ("To violate this paragraph, a person must have knowledge that the organization is a designated terrorist organization * * *, that the organization has engaged or engages in terrorist activity * * *, or that the organization has engaged or engages in terrorism.").

3. Petitioners contend (Pet. 21-28) that, even if defendants in Section 2339B prosecutions could otherwise be foreclosed from contesting the validity of the underlying FTO designations, that preclusion rule is impermissible here because the AEDPA designation procedures were themselves unconstitutional. Petitioners rely principally on this Court's decision in *Freedman* v. *Maryland*, 380 U.S. 51 (1965). That argument lacks merit and does not warrant this Court's review.

a. The defendant in *Freedman* was convicted of exhibiting a film without the prior approval of a state censorship board. See 380 U.S. at 52-53. This Court held that the state procedural regime governing authorization to exhibit motion pictures was constitutionally infirm. See *id.* at 59-60. Like *McKinney*, *Freedman* involved core First Amendment activity occurring within this country rather than the transfer of funds to a foreign entity. And, like *McKinney*, *Freedman* did not implicate the power of Congress and the Executive Branch to direct this Nation's foreign affairs.

In light of those differences alone, the decision in *Freedman* casts no meaningful light on the question

presented here. In particular, *Freedman* does not support petitioners' contention that they are constitutionally entitled to contest the validity of the underlying FTO designations in defending against the current criminal charges. As the Fourth Circuit has explained, "Congress has provided that the *fact* of an organization's designation as an FTO is an element of [the offense under 18 U.S.C.] § 2339B, but the *validity* of the designation is not." *Hammoud*, 381 F.3d at 331; see Pet. App. 22a ("Under § 2339B, if defendants provide material support for an organization that has been designated a terrorist organization under § 1189, they commit the crime, and it does not matter whether the designation is correct or not."). *Freedman* simply does not speak to the question whether Congress may define as a criminal offense the provision of money to an organization that has in fact been designated as an FTO, without regard to the validity of the designation.

b. Petitioners' claim of a constitutional right to attack the validity of the 1997 and 1999 designations is especially misguided because the MEK itself possessed and invoked the right to judicial review in the District of Columbia Circuit. In *People's Mojahedin Organization of Iran* v. *Department of State*, 182 F.3d 17 (1999), cert. denied, 529 U.S. 1104 (2000), the District of Columbia Circuit upheld the Secretary of State's 1997 designation of the MEK as an FTO. With respect to the procedures used to effect the designation, the court held that, as a foreign organization without a presence in the United States, the MEK could not claim rights under the United States Constitution. See *id.* at 22 ("No one would suppose that a foreign nation had a due process right to notice and a hearing before the Executive imposed an embargo on it for the purpose of coercing a

change in policy."); see also *Price* v. *Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 95-96 (D.C. Cir. 2002) (holding that foreign states are not covered by the Due Process Clause). That holding will encompass the large majority of designated FTOs. Cf. *32 County Sovereignty Comm.* v. *Department of State*, 292 F.3d 797, 799 (D.C. Cir. 2002). And because the indictment in this case was premised in part on conduct alleged to have occurred during the period when the 1997 designation was in effect, that holding provides an independently sufficient basis for rejecting petitioners' contention that they are entitled to dismissal of the indictment.

In *NCRI I*, *supra*, the District of Columbia Circuit held that the 1999 designation of the MEK/NCRI violated the organization's rights under the Due Process Clause. 251 F.3d at 201-204; see p. 5, *supra*. In remanding the matter to the Secretary of State, however, the court expressly declined to "order the vacation of the existing designations." *Id*. at 209. After providing the MEK with additional process on remand, the Secretary again designated the MEK as an FTO and declined to vacate the 1999 designation, and the District of Columbia Circuit sustained the government's actions. See *People's Mojahedin II*, 327 F.3d at 1241-1245; *NCRI II*, 373 F.3d at 156-160.

Thus, "the MEK has been designated a terrorist organization throughout the relevant period, and that designation has never been set aside." Pet. App. 26a. And, as the court of appeals recognized in this case, any errors in the process that produced the 1999 designation were ultimately "harmless because the MEK proudly proclaimed its own terrorist activities." *Id*. at 24a. Under those circumstances, it is particularly clear that petitioners have suffered no deprivation of constitutional

rights as a result of their inability to challenge the designations that underlay this prosecution.

c. The question whether a prosecution under 18 U.S.C. 2339B (2000 & Supp. IV 2004) may be premised on an FTO designation that was held to be procedurally invalid but was never vacated is unlikely to arise in the future. In accordance with the District of Columbia Circuit's decision in *NCRI I*, the Secretary of State currently affords the process that decision requires before designating as an FTO an organization with a significant United States presence. See, *e.g.*, *Kahane Chai* v. *Department of State*, 466 F.3d 125, 127 (D.C. Cir. 2006). Thus, to the extent that petitioners' constitutional claim rests on the fact that the 1999 designation was held to be procedurally invalid in a manner that the District of Columbia Circuit ultimately found to be harmless, the question presented is of no ongoing importance and therefore does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 2006